IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 11 OF 2004.

Mr. Suresh Shetye,
resident of Ansabhat,
Mapusa, Bardez, Goa. .... Appellant.

Versus

1. Shri Prasad Khalidas Divkar,
resident of Divkar Sadan,
Near Ganesh Chawk,
Khorlim, Mapusa, Goa.

2. State
Through Public Prosecutor. ..... Respondents.

3. Shri V. Menezes, Advocate for the Appellant.

Shri S.D. Lotlikar, Senior Advocate with Ms. K. Sambari, Advocate for the Respondent No.1.

Shri S.N. Sardessai, Public Prosecutor for the State/Respondent No.2.

CORAM: N. A. BRITTO, J.

Date of Reserving the Judgment: 25.11.2004.
Date of Pronouncing the Judgment: 2.12.2004.

JUDGMENT:

This appeal is filed against the acquittal of the accused under section 138 of the Negotiable Instruments Act, 1881, (The Act, for short) by Judgment/Order dated 12th November, 2003 of the learned J.M.F.C., Mapusa.

2. The case of the complainant, briefly stated, is that the accused approached him for a friendly loan of Rs.75,000/- which the complainant gave to the accused and the accused in turn gave to the complainant two cheques

dated 31.3.99 for Rs.50,000/- and dated 30.4.99 for Rs.25,000/-, which cheques the complainant deposited in Goa Urban Cooperative Bank, Mapusa, but they were returned with the endorsement ' Account Closed ' dated 29.7.99. The complainant then sent a legal notice dated 5.8.99 demanding the payment of the said Rs.75,000/- within 15 days which notice was returned to the complainant with the endorsement ' Unclaimed returned to sender ' on 19.8.1990. Thereafter the complainant filed the complaint.

3. The complainant examined himself and, inter alia, produced the said two cheques, memorandum for the return of the said two cheques, postal receipt, notice dated 5.8.99, etc. The accused also produced through the complainant a note written by the complainant to the accused on an envelope (Exh.CW1/A1).

4. The case of the accused was that he had obtained a friendly loan not in the year 1995, but in the year 1998 and the cheques given by him were in the year 1995 and they were by way of security for the said loan and the same were given without date and name having been written on the same. The accused further stated that his account in Mapusa Urban Cooperative Bank was closed in the year 1997 and the said cheques were returned because the account was closed. The accused further stated that he had paid the full amount of the loan along with interest and he was not liable to pay any amount to the complainant either on 31.3.99 or 30.4.99, being the dates of the said two cheques and that the said complainant had mis-used the said two cheques which were given by way of security for the said loan of Rs.75,000/-. The accused also stated that

serial numbers of the said two cheques pertained to the series of cheques of the year 1995-96 of the Bank when he had paid the loan in instalments. The accused along with the said statement recorded under Section 13 of the Code of Criminal Procedure 1973 (Code, for short) produced the statement of his accountNos.40616 and 317331. The accused also produced a certificate from the Mapusa Urban Cooperative Bank to show that the said Account No.40616 was closed on 9.10.97. The accused also filed a copy of the complaint dated 13.2.98 addressed to the Police Inspector wherein the accused had alleged that the complainant had refused to return the cheques with intention to harass him. The accused had also produced an anticipatory bail application filed by him on 14.9.98 which was registered as A.B.A. No.344/98 in the Court of Sessions.

5. The learned J.M.F.C. after considering the evidence of the complainant in the light of the documents produced by the complainant as well as the documents produced by the accused along with his said statement under S.313 of the Code including the said writing/note written by the complainant to the accused and which was produced through the complainant, came to the conclusion that the complainant had failed to prove that the accused owed any debt or liability to be paid by the accused and therefore proceeded to acquit the accused under Section 138 of the Act.

6. The main contention of Shri Menezes, the learned Advocate appearing on behalf of the complainant in this appeal, is that the statement recorded under S.313 of the Code is no evidence and if the documents produced by the

accused along with his said S.313 statement are taken out, then the case of the complainant ought to have been held as proved with the aid of the presumptions available in favour of the complainant under the Act. Shri Menezes has submitted that the said presumptions could have been rebutted by the accused only by leading evidence and proving the documents produced by him and the said presumptions could not be rebutted by the statement of the accused under S.313 of the Code alone. Shri Menezes has placed reliance on the case of **The State of Maharashtra v. Dr. R.B. Chowdhari and others (A.I.R. 1968 S.C. 110)** in support of his submission that the statement of the accused recorded under S.313 of the Code is not evidence given by the accused. In fact, what has been stated by the Hon'ble Supreme Court in the aforesaid decision is that although a statement of an accused under S.342 (now S.313) can be taken into consideration in an inquiry or trial, it is not strictly evidence in the case. Shri Menezes has also placed reliance on the case of **K. Bhaskaran v. Sankaran Vaidhyan Balan and another (A.I.R. 1999 S.C. 3762)** and submitted that the presumption envisaged under S.118 of the Act could have been legally inferred that the cheque was made or drawn for consideration on the date which the cheque bears as the signature on the cheque was admitted. Shri Menezes has also placed reliance on the case of **Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 S.C.C. 16]** and has submitted that both Sections 138 as well as 139 of the Act require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, and it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. The Supreme Court in this case has further held that it introduces an

explanation to the general rule as to the burden of proof in criminal cases and shifts the onus to the accused. Such a presumption is a presumption of law as distinguished from a presumption of fact which describes provisions by which the Court ' may presume ' a certain sate of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact (emphasis supplied).

7. On the other hand, Shri Lotlikar, the learned Senior Counsel, has submitted that the admissions obtained from the complainant in the course of cross-examination is also evidence on the basis of which the presumptions could be rebutted and it does not mean that in each and every case the accused is required to step into the witness box to lead evidence to displace the presumptions. Shri Lotlikar has further submitted that the documents produced by the accused along with his statement under S.313 of the C ode may not be evidence but they are produced to explain the stand taken by the accused in his statement under S.313 of the Code. Shri Lotlikar has also submitted that it is not required of the accused to prove his case beyond reasonable doubt and all that is required of the accused is to probablise the defence. Shri Lotlikar has submitted that the documents produced by the accused in this case were of unimpeachable character and were produced without any objection on the part of the complainant.

8. There is no doubt that the Act has created certain presumptions in favour of the complainant. Section 118 of the Act creates certain presumptions as to certain negotiable instruments and amongst them is a presumption regarding consideration and as to date. As regards consideration, it provides that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration, and as to date, that every negotiable instrument bearing a date was made or drawn on such date. Section 139 of the Act provides that it shall be presumed unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Section 313 of the Code gives power to the court to examine the accused, and, inter alia, provides that in every inquiry or trial for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court should put such questions to him as the court considers necessary to enable the accused personally to explain any circumstances appearing in the evidence against him. It also provides that the answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry or trial for any other offence which such answers may tend to show he has committed.

9. In my view the submission that the entire case of the accused was based on the documents produced by the accused in his statement under S.313 of the

Code cannot be accepted. As already noted the accused also had produced the said note dated 23.9.97 (Exh.CW1/A-1), the execution of which the complainant had admitted. On this note the complainant had clearly mentioned that the accused owed to him Rs.13,000/- towards interest and in case the said amount was not paid on the next date the complainant would deposit the cheques in the Bank. The said writing/note clearly indicated that the contention of the accused that the cheques were given by way of security could not be ruled out. The other documents namely the application for anticipatory bail dated 14.9.98 and so also other complaints produced by the accused dated 12.2.98 and 13.2.99 against the complainant were sufficient to rebut the presumption as regards the date 'on the cheque'. In fact, it was rightly observed by the learned J.M.F.C. that the said complaints indicated that the complainant and the accused were not sharing good vibes and their relations were not excellent between the period from February, 1998 to December, 1998 and therefore the version of the complainant that the loan was given in December, 1998 is unbelievable. Although the complainant had denied that the accused had not given any other cheque besides the cheques at Exh.CW.1/A-1, the accused had produced the said statement from Mapusa Urban Cooperative Bank which clearly showed that between 24.4.96 and 24.6.97 an amount of Rs.1,15,000/- was paid by cheques to the complainant by the accused and when the complainant was further cross-examined with reference to the said payments by cheques, all that the complainant stated was that he did not remember whether the accused has paid the said amounts to him by cheques or not.

10. In my view the circumstances appearing against the accused could be explained by the accused not only by oral answers given by him but also could be explained with the help of documents which are unimpeachable or reliable. There is nothing in the Code to shrink the scope of such explanations only by way of oral answers and the explanations could also be given by way of documents, authenticity of which cannot be doubted. That was precisely what was done by the accused in this case by producing the said documents such as statement of his bank account and other documents. In fact, the complainant did not make any grievance regarding the genuineness of the documents produced by the accused either before the trial Court or this Court.

11. In view of the above, the acquittal of the accused could not be faulted. I find there is no merit in this appeal and consequently the same is hereby dismissed.

N. A. BRITTO, J.

sl.